DOCKET NO.: CV 206109292

FRIENDS OF KENSINGTON PLAYGROUND, ET AL.	:	SUPERIOR COURT
V.	:	JUDICIAL DISTRICT OF NEW HAVEN
CITY OF NEW HAVEN	:	JUNE 9, 2022

MEMORANDUM OF DECISION RE:
DEFENDANT CITY OF NEW HAVEN'S
MOTION TO STRIKE (#126.00)

On October 20, 2021, the defendant City of New Haven filed a motion to strike the plaintiffs Friends of Kensington Playground's and Patricia Wallace's revised complaint in its entirety on the ground that the allegations in the complaint are insufficient to state a cause of action under § 22a-16, which is part of the Connecticut Environmental Protection Act (CEPA). The defendant also filed a memorandum of law in support. The plaintiffs filed an objection and a memorandum of law in opposition on October 21, 2021. The court heard oral argument on the motion on March 9, 2022.

FACTS

The plaintiffs, Friends of Kensington Playground and Patricia Wallace, filed a revised one-count complaint against the defendant, City of New Haven, on August 19, 2021, claiming a violation of General Statutes § 22a-16. The plaintiffs allege the following facts. The defendant is a municipal corporation that currently owns Kensington

Playground, "a public park and playground space consisting of 5 parcels of land that total 0.67 acre," which is located on Kensington Street in New Haven. Rev. Compl. ¶¶ 4, 5, 13. The plaintiffs use and enjoy the park, "the park has been dedicated to public use for several decades and has been accepted and used by the public as a public park and playground space to the present day," and its "use was designated as park or open space on the zoning maps of the [defendant]." Rev. Compl. ¶¶ 6, 10, 15. The park is a natural resource of the state, "contains trees which exist as part of the urban forest of New Haven, and provides a tranquil green and recreational space for the nearby residents." Rev. Compl. ¶¶ 7, 19. On October 19, 2020, the defendant held a public hearing required by city charter on the transfer of the park to a third party for the purpose of residential construction, and the application was approved that day. Rev. Compl. ¶¶ 8, 12. "On October 27, 2020, the [defendant] posted notice on its website that it had granted approval for transfer [of the park] to a third party for the purposes of constructing residential housing units and a parking lot." Rev. Compl. ¶ 13.

The plaintiffs allege that the transfer and removal of the park "will result in a permanent loss of playground and park open space in the Dwight Neighborhood and Dwight Street National Historic District." Rev. Compl. ¶ 14. The proposed construction will result in "the clearing of mature trees." Rev. Compl. ¶ 21. The transfer and removal of

the park is further likely have the following effects: "a loss of the enjoyment of recreational playground space for young children and families within walking and stroller distance of the park; reducing the forest canopy and ecological services provided by the trees and vegetation in the park; impairing the psychological well-being of neighboring residents who rely upon the healthful effects of urban park and recreational space; impairing neighboring property values through the loss of recreational amenities; [and] park and recreational open space will be fragmented and thus rendered less valuable ecologically and recreationally." Rev. Compl. ¶ 14.

The plaintiffs further allege that the defendant failed to hold a separate public hearing dedicated solely to the replacement of the park land and that this failure deprived the plaintiffs and the public of an opportunity to advocate for the protection of the park. Rev. Compl. ¶¶ 16, 18. The defendant additionally failed to "provide comparable replacement land at least equal in value and per unit area size to the value and per unit area size of the land taken . . . ." Rev. Compl. ¶ 18. The defendant's failures were violations of General Statutes § 7-131n, and the defendant's failure to replace the park land constitutes an unreasonable impairment of natural resources in violation of § 22a-16. Rev. Compl. ¶¶ 17, 18, 20. The plaintiffs seek injunctive, declaratory, and equitable relief to prevent the unreasonable impairment or destruction of the park.

DISCUSSION

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[A] motion to strike . . . requires no factual findings by the trial court . . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . [A]ll well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016). "Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded . . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient . . . ." (Internal quotation marks omitted.) *J.D.C. Enterprises, Inc.* v. *Sarjac Partners, LLC*, 164 Conn. App. 508, 512-13, 137 A.3d 894, cert. denied, 321 Conn. 913, 136 A.3d 1274 (2016). "A motion to strike is properly granted

if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 349, 63 A.3d 940 (2013).

General Statutes § 22a-16 provides in relevant part: "[A]ny person . . . association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business . . . for declaratory and equitable relief against the state [or] any political subdivision thereof . . . acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ." "General Statutes § 22a-17, which describes the burden of proof for claimants under § 22a-16, requires the plaintiff to prove causation, which is essential to such a claim, by establishing that the conduct of the defendant, acting alone, or in combination with others, has, or is reasonably likely unreasonably to pollute, impair or destroy the public trust in the air, water or other natural resources of the state . . . ." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 140 Conn. App. 155, 164, 57 A.3d 898, cert. denied, 308 Conn. 929, 64 A.3d 120 (2013). At the motion to strike stage, a claim brought pursuant to § 22a-16 "must set forth facts to support an inference that unreasonable pollution,

impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." (Internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 712, 99 A.3d 1038 (2014). The allegations must "provide . . . indication as to how or why the [defendant's actions are] likely to cause unreasonable harm to the environment." *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 432, 829 A.2d 801 (2003).

"[W]hen there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment [or destruction] under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." *Waterbury* v. *Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002). "[T]he mere allegation that a defendant has failed to comply with certain technical or procedural requirements of a statute imposing environmental standards does not, in and of itself, give rise to a colorable claim of unreasonable pollution, [impairment, or destruction] under the [CEPA]. . . . A claim that the defendant has violated the substantive provisions of such a statute, however, may give rise to an inference that the conduct causes unreasonable pollution, [impairment, or destruction]." (Internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, supra, 313 Conn. 712-13. Put another way, conduct that may be unreasonable

under CEPA is that which has "a direct effect on the environment" or "directly threaten[s] the environment." *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 141 n.21, 836 A.2d 414 (2003).

Our Supreme Court has recognized that "trees and wildlife are natural resources regardless of their economic value . . . ." *Paige* v. *Town Plan & Zoning Commission*, 235 Conn. 448, 454, 668 A.2d 340 (1995). "[W]here the legislature has chosen to specifically articulate what is meant by natural resources, it has included trees and wildlife and has given no indication that the term as used throughout [CEPA] should be afforded different meanings." Id., 457.

The defendant argues in its memorandum of law in support of the motion to strike that the plaintiffs have failed to allege with any specificity what unreasonable harm to the environment is likely to occur upon the defendant's transfer of the park property to a third party and, further, that the plaintiffs have failed to provide any indication as to how or why the defendant's conduct is likely to cause that harm. The plaintiffs respond in their memorandum of law in opposition that parkland and open space is a natural resource under our state's law, that there is a very low bar for a pleading to allege a justiciable harm under CEPA, that the court should look to the applicable environmental regulatory scheme – General Statutes § 7-131n – to determine if the plaintiffs have alleged conduct that is

unreasonable under CEPA, and that the plaintiffs have sufficiently alleged unreasonable harm.

I. Applicability of General Statutes § 7-131n

The plaintiffs identify the regulatory framework that forms the basis of the CEPA claim as Connecticut's park replacement statute, General Statutes § 7-131n, which provides in relevant part: "If any municipality takes any land, for highway or other purposes, which land was purchased for park or other recreational or open space purposes . . . or which had been dedicated for such purposes, such municipality shall provide comparable replacement land at least equal in value and per unit area size to the value and per unit area size of the land taken; provided before such municipality takes such land for highway or other purposes it shall hold a public hearing in addition to any public hearing required by section 13a-58 or by any other section of the general statutes or by any special act or city charter. At such public hearing and in the notice thereof, the municipality shall set forth the description of the land proposed to be taken and the proposed use of such land, any reasons for the proposed taking of the parkland rather than other land and the description of the replacement land to be provided. . . . [S]uch hearing shall be held within a period of not more than thirty and not less than fifteen days after any other public hearing required . . . ."

Our Appellate and Supreme Courts have not yet addressed the issue of whether a municipality's repurposing or transfer of land it already owns constitutes a taking for purposes of § 7-131n. The issue of repurposing has, however, been addressed in three Superior Court cases. See *Marinelli* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND-CV-19-6115087-S (January 19, 2021, *Berger, J.T.R.*); *Bushnell Tower Condominium Assn., Inc.* v. *Hartford Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. LND-CV-15-6058094-S (September 11, 2015, *Berger, J.*) (61 Conn. L. Rptr. 112); *Polotaye* v. *Zoning Board*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-4015041-S (September 6, 2011, *Tierney, J.T.R.*).

In the earliest of the three cases, *Polotaye*, the court discussed the plaintiff's claim that a city's replacement of a municipally-owned recreational land's grass turf with artificial turf and the city's failure to provide a public hearing on the replacement constituted a taking in violation of § 7-131n. *Polotaye* v. *Zoning Board*, supra, Superior Court, Docket No. CV-08-4015041-S. Noting that our trial and appellate courts had yet to discuss § 7-131n, the court concluded that "[t]he change of turf on an existing athletic field bears no resemblance to governmental takings in eminent domain condemnation, inverse

condemnation or zoning taking matters. . . . The plaintiffs have stretched General Statutes § 7-131n well beyond its bounds." Id. In the most recent case, *Marinelli*, the plaintiff argued that a city zoning commission violated § 7-131n in granting a water authority's application for a site plan to construct a water tank and parking lot on city land. *Marinelli* v. *Planning & Zoning Commission*, supra, Superior Court, Docket No. LND-CV-19-6115087-S. Among other reasons given by the court for its determination that there was no violation of § 7-131n, Judge Trial Referee Berger relied on his earlier conclusion in *Bushnell Tower Condominium Association, Inc.* and reiterated that "the unambiguous language of [§ 7-131n] also makes it clear that it applies to a taking. The municipality did not take this land; it already owned it." Id.; see *Bushnell Tower Condominium Assn., Inc.* v. *Hartford Planning & Zoning Commission*, supra, 61 Conn. L. Rptr. 116 n.21 ("[s]ince the city owns the land, it is not actually taking the land, but is utilizing it for a different purpose").

Section 7-131n offers no statutory definition of "takes" or "taking," and our courts have not explicitly defined was constitutes a "taking" for purposes of § 7-131n. Determining whether the alleged conduct of the defendant constitutes a "taking" for purposes of § 7-131n requires the court to engage in the process of statutory interpretation. "The process of statutory interpretation involves the determination of the meaning of the

statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *State* v. *Bemer*, 339 Conn. 528, 540-41, 262 A.3d 1 (2021). "In interpreting statutes, words and phrases are to be construed according to their commonly approved usage . . . . Generally, in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage." (Citations omitted; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 697, 258 A.3d 1268 (2021).

The Supreme Court has cited Black's Law Dictionary as a source of definitions of common words and terms. See *Verna* v. *Commissioner of Revenue Services*, 261 Conn.

102, 110, 801 A.2d 769 (2002). "Take" is defined by Black's Law Dictionary as "[t]o obtain possession or control, whether legally or illegally . . . [t]o seize with authority; to confiscate or apprehend . . . [t]o acquire (property) for public use by eminent domain; (of a governmental entity) to seize or condemn property . . . [t]o acquire possession by virtue of a grant of title, the use of eminent domain, or other legal means; esp., to receive property by will or intestate succession . . . ." Black's Law Dictionary (11th Ed. 2019). For purposes of constitutional law, a "taking" is defined as "[t]he government's actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility." Id. For purposes of criminal and tort law, a "taking" is defined as "[t]he act of seizing an article, with or without removing it, but with an implicit transfer of possession or control." Id. A "physical taking" or "actual taking" is defined as "[a] physical appropriation of an owner's property by an entity clothed with eminent-domain authority." Id. A "permanent taking" is defined as "[a] government's taking of property with no intention to return it. The property owner is entitled to just compensation." Id.

Based on their dictionary definitions, the words "take" and "taking" are commonly used to mean the physical or legal transfer of property from one person or entity to another. This interpretation of the terms is supported by their usage in similar statutes within the

same statutory scheme as § 7-131n, including General Statutes § 7-131j, which governs the taking of municipal conservation or recreational land by the state or a public service company, and General Statutes § 7-131o, which governs the taking of active agricultural land by a municipality, town, city, borough, or district by eminent domain.[1] The use of the words "takes" and "taking" within §§ 7-131j and 7-131o refers to (1) the state's taking of municipal land and (2) a municipality's taking of land by eminent domain. Both scenarios necessarily require two separate parties: the owner of the land and the taker of the land.

After examining the text of § 7-131n and considering its relationship with other statutes, "the meaning of [the] text is plain and unambiguous and does not yield absurd or unworkable results." (Internal quotation marks omitted.) *State* v. *Bemer*, supra, 339 Conn. 541. Section 7-131n applies to a municipality's taking of land owned by another person or entity. Section 7-131n does not apply where a municipality seeks to repurpose or transfer

[1] Section 7-131j provides in relevant part: "If the state or any public service company . . . takes any land, for highway or other purposes, which is restricted to conservation or recreation use in accordance with an established open space program . . . to the municipality in which the land is located, the state or such company shall provide comparable land to be included in such program or shall grant or pay to the municipality sufficient funds to be used for such purpose . . . . At [the] public hearing [required by this section] . . . the state shall set forth the description of the land proposed to be taken and the proposed use of such land, together with any reasons for the proposed taking of the open space land rather than other land." Section 7-131o provides in relevant part: "A municipality, town, city, borough or district . . . that takes active agricultural land by eminent domain shall: (1) Purchase an agricultural conservation easement on an equivalent amount of active agricultural land of comparable or better soil quality in such municipality, town, city, borough or district; or (2) if no comparable active agricultural land is available for an agricultural conservation easement . . . pay a fee for the purchase of development rights to an equivalent amount of active agricultural land of comparable or better soil quality elsewhere in the state."

land that it already owns. See *Marinelli* v. *Planning & Zoning Commission*, supra, Superior Court, Docket No. LND-CV-19-6115087-S; *Polotaye* v. *Zoning Board*, supra, Superior Court, Docket No. CV-08-4015041-S. Thus, in the present case, § 7-131n does not specifically govern the conduct that the plaintiffs claim constitutes an unreasonable impairment or destruction of natural resources under § 22a-16.

II. Other Availability of an Action Under § 22a-16

The court now considers whether the plaintiffs' allegations other than those invoking the standards of § 7-131n state a legally sufficient cause of action under § 22a-16. The language of *Waterbury* v. *Washington*, supra, 260 Conn. 557, states that "*when* there is an environmental legislative and regulatory scheme in place . . . whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." (Emphasis added.) At least two of our Superior Courts have previously concluded that "[t]he absence of a comprehensive legislative and regulatory scheme does not mean an action under § 22a-16 is unavailable. . . . [G]iven the broad language of § 22a-16 and the protective policy of CEPA, it cannot be said that in the absence of such a regulatory scheme or statute . . . action cannot be taken to protect the environment. How else to

explain the language of [General Statutes] § 22a-20[2] . . . That language . . . at least suggests there exists another universe of injunctive protection for our environment areas not covered by a specific regulatory scheme or controlled by a detailed statutory enactment." (Footnote added; internal quotation marks omitted.) *Mateo* v. *Mann*, Superior Court, judicial district of Hartford, Docket No. CV-08-5022203 (April 1, 2009, *Satter, J.T.R.*) (47 Conn. L. Rptr. 479, 480); see *Committee to Save Guilford Shoreline, Inc.* v. *Arrow Paving*, Superior Court, judicial district of New Haven, Docket No. CV-06-4020284-S (March 2, 2007, *Corradino, J.*) ("[I]injunctive relief [may be] sought . . . based on a claim of violation of a regulatory scheme aimed at the activity or a detailed statutory scheme controlling the activity. But this is not the only universe in which relief can be sought under § 22a-16.").

In *Mateo* v. *Mann*, supra, 47 Conn. L. Rptr. 479, the plaintiff alleged that effluent from the defendants' property was flowing into nearby wetlands and was harmful because it contained "excessive concentration of phosphorus" and was unreasonably polluting, impairing, or destroying the wetlands, impairing their function, and encouraging growth of invasive species, in violation of § 22a-16. Though the defendants argued that the claim was legally insufficient because the plaintiff failed to cite any legal standard for excessive

[2] Section 22a-20 provides in relevant part: "Nothing herein shall prevent the maintenance of an action, as provided in [§§ 22a-14 to 22a-20], to protect the rights recognized herein, where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of the rights."

levels of phosphorus under CEPA, the court concluded that the claim was legally sufficient "without alleging standards that constitute unreasonable pollution." Id., 480. The *Mateo* court looked to previous Supreme Court and lower court opinions construing the word "unreasonable" as used in § 22a-16. Id., 480. For example, in *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 136-37 n.29, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006), our Supreme Court concluded "that the trial court properly determined that [t]o sever every tree and woody-stemmed bush [in a wetland], regardless of height and species, destroyed important floodplain forest excessively and unnecessarily, and was, therefore, unreasonable." (Internal quotation marks omitted.) In *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 503, 400 A.2d 726 (1978), the court upheld a trial court decision that considered the overall environmental impact of a proposed development project in determining whether the destruction of a portion of a river estuary would be unreasonable.

At the motion to strike stage, factual allegations need only support an inference that unreasonable harm is likely or probable. See *FairwindCT, Inc.* v. *Connecticut Siting Council*, supra, 313 Conn. 712; *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 432-33. In *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 431, the Supreme Court considered the plaintiff's allegation "that [a development] plan called for

demolition [of certain buildings] without consideration of 'feasible and prudent alternatives.'" The court found such an allegation insufficient to support an inference of unreasonable harm to the environment, noting: "[I]t is not evident how the defendants' failure to follow certain procedural requirements in adopting the development plan or to consider alternatives to the demolition of buildings . . . is likely to cause such harm. Nor is it apparent what the nature of any such harm might be." Id., 433.

In the present case, the plaintiffs allege that the natural resource in danger of impairment or destruction is a public park, which consists of a forest canopy including trees and vegetation. The plaintiffs have sufficiently specified the natural resource in danger of impairment or destruction. See *Paige* v. *Town Plan & Zoning Commission*, supra, 235 Conn. 454, 457. Though the defendant argues in its memorandum of law in support of the motion to strike that the plaintiffs fail to allege "how or why the trees and vegetation would be affected by a transfer of the park property at all," the situation in the present case is different from that in *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 433, in which the court found that the nature of the alleged harm was not apparent. In the present case, the plaintiffs' allegation that the defendant has agreed to transfer park land consisting of less than one full acre for the purpose of constructing multiple housing units and a parking lot supports an inference that the trees or vegetation

on that land will be at least impaired, if not destroyed. See *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 398 ("[w]hat is necessarily implied [in an allegation] need not be expressly alleged").

Several of the plaintiffs' allegations are directed to the environmental impact of the impairment or destruction of the park. The allegations specify the harm likely to occur as the clearing of mature trees, a permanent loss of playground and open space in the neighborhood, a loss to the neighborhood residents of the healthful effects of an urban park, a reduction of the forest canopy, a reduction of the ecological services provided by the trees and vegetation in the park, and fragmentation and reduction of ecological and recreational value of the open park space. The plaintiffs allege that these harms will occur because the defendant proposes to take land currently designated on zoning maps as park land and develop that land without replacing it. Construed broadly and realistically and in favor of the non-moving party, the plaintiffs' allegations support an inference that "unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities [of the defendant] unless remedial measures are taken." (Internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, supra, 313 Conn. 712. Consequently, the plaintiffs have sufficiently stated a cause of action under § 22a-16.

CONCLUSION

For the forgoing reasons, the court hereby denies the defendant's motion to strike the revised complaint.

Juris No. 427017
James W. Abrams, Judge